

**STATE OF NORTH DAKOTA**  
**COMMISSIONER OF AGRICULTURE**

IN THE MATTER OF:

Gordon Krech and  
Rolla Flying Service, Inc.

Respondents.

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**RECOMMENDED  
FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

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On February 27, 2001, a Complaint was filed with the Commissioner of Agriculture by Jeff Weispfenning, Deputy Commissioner, North Dakota Department of Agriculture ("Department"), requesting certain administrative action against Rolla Flying Service, Inc. and Gordon L. Krech. The complaint cites as grounds for administrative action violations by the Respondents of N.D.C.C. § 4-35-15(2) and (5). On April 23, 2001, the Respondents filed an Answer.

On April 25, 2001, the Commissioner of Agriculture requested the designation of an administrative law judge (ALJ) from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order, in regard to the Complaint. On April 30, 2001, the undersigned ALJ was designated.

On May 1, 2001, the ALJ issued a Notice of Hearing scheduling a June 12, 2001, hearing. On May 2, 2001, the ALJ issued a Notice of Rescheduled Hearing rescheduling the hearing for August 9, 2001. On August 7, 2001, the ALJ issued a Notice of Continued and Rescheduled Hearing rescheduling the hearing for August 22, 2001. On August 22, 2001, the ALJ issued a Notice of Continued and Rescheduled Hearing rescheduling the hearing for September 19, 2001.

Prior to the hearing the Respondents petitioned for an Order Permitting Discovery which order was signed by the ALJ on June 21, 2001. The Department did not object to the Respondents' discovery petition.

The hearing was held as rescheduled on September 19, in the Office of Administrative Hearings, Bismarck, North Dakota. Assistant Attorney General Matthew A. Sagsveen represented the Department. The Department called four witnesses. The Department offered eight exhibits (exhibits 1-5, 9, 10, and 12) all of which were admitted, some over objection. The Respondent, Gordon Krech, was present at the hearing. Attorney E. Thomas Conmy, III, Fargo, represented the Respondents at the hearing. The Respondents called two witnesses. The Respondents offered thirteen exhibits (exhibits 6-8, 11, and 13-21) all of which were admitted, some over objection. Some of the witness testimony was taken over telephone. An exhibit list is attached to this decision.

The hearing was not completed on September 19. It was continued until September 26, 2001, at which time the testimony of the Respondents' final (third) witness was taken via telephone.

On September 4, 2001, the Department gave notice of intent to introduce the affidavits of Elsie O'Donnell and Mary O'Donnell in lieu of their testimony at the hearing. After the Respondents objected, without the opportunity to cross-examine them, the ALJ did not allow the affidavits without an opportunity to cross-examine. The Department did call Elsie O'Donnell; her affidavit was admitted (exhibit 2). The state decided not to call Mary O'Donnell; her affidavit was not admitted.

The parties agreed to file written closing briefs. The Department filed its brief on October 11, 2001, as requested. The Respondents were to have filed their brief by October 17, 2001, and the Department was to have filed a reply brief by October 24, 2001. However, at the request of counsel for the Respondents and, later, counsel for the Department, the briefing deadlines were

rescheduled to October 26 and November 7, respectively. The Respondents' and Department's briefs were timely filed according to the rescheduled briefing deadlines.

With their closing brief, Respondents filed a proposed late-filed exhibit. The exhibit is relevant. The Department objected not to the content of the exhibit but the lack of foundation. The exhibit is admitted but it should be noted that the exhibit does not substantially affect the ALJ's decision in this matter. The late-filed exhibit is marked as exhibit 22.

Based on the evidence presented at the hearing and the briefs of counsel, the administrative law judge makes the following recommended findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. Rolla Flying Service, Inc. ("Rolla") is a North Dakota business corporation, incorporated in March 1984, a corporation in good standing with the North Dakota Secretary of State. Its address is RR1, Box 104, Rolla, ND 58367.
2. Gordon L. Krech ("Krech") is an officer and employee of Rolla. Krech's address is RR1, Box 103B, Rolla, ND 58367.
3. Krech is commercially certified in North Dakota in the AG Pest Control, Air Core, Ground Core and Row application categories until April 2002, under commercial certification number 16039. Krech was commercially certified in August 2000, also.
4. In 2000, Rolla made aerial applications of pesticides on about 86,000 acres of farmland in North Dakota. Krech personally made aerial applications of pesticides on about 40,000 acres. Rolla does not make ground applications of pesticides.
5. On August 23, 2000, Krech was flying for Rolla and applied Roundup Ultra RT ("Roundup") for Howard and Bob Good on their field of flax located on the North 1/2 of the Southwest 1/4 of Section 33, Picton Township, Towner County. The field is an approximately

80-acre field north and west of the Elsie O'Donnell farmstead ("the farmstead"). (Elsie O'Donnell will be referred to as "Elsie.")

6. At approximately 8:00-8:30 p.m. on August 23, Krech was making the Roundup application on the Good flax field. The wind was almost directly from the south at approximately 5-9 mph, possibly slightly from the east (*i.e.*, south, southeast). Complaint; *see* exhibits 7 and 8.

7. Mary O'Donnell, Elsie's daughter, was visiting Elsie at the farmstead during the application. Either Elsie or Mary called Rolla (Rolla was called twice) and told someone at the Rolla office that the aerial application on the Good flax field should stop because pesticide spray was falling on the farmstead and the plane was flying over the farmstead, scaring the animals. Krech did not stop the aerial application until he was finished spraying the flax field.

8. After the aerial application by Krech on August 23, a few days later, Elsie called the Department to complain, and on October 1, 2001, Elsie filed a complaint against Rolla and Krech with the Department. Exhibit 1; *see* exhibit 2, Affidavit of Elsie O'Donnell.

9. Elsie testified that during the August 23 application Krech flew directly over the farmstead 7-10 times. She said that the plane flew so low that there was very little space between it and the treetops. She said that she could smell pesticides in the air as the plane flew over. Elsie also testified that the plane was flying North and South, not East and West, when it flew over the farmstead. She said that it appeared to be spraying the field further west of her farmstead not on the field right next to the farmstead. *See* exhibit 6.

10. Elsie testified that after the Rolla application on August 23, she could see what she believed was pesticide damage on almost everything she looked at on the farmstead (on the

farmstead plants). She said that a few days after the Rolla application she could detect damage in much of the foliage on the farmstead.

11. Elsie testified that she does little pesticide spraying on the farmstead. She said that she did none in 2000 and she knew of no one else spraying around her property in 2000, either aerial or ground spraying, however, she acknowledged that she is not always on her farmstead and does leave at times to go elsewhere. She said that she does not use weed killer and does not use Roundup. She said that Rolla had been spraying near her property again in 2001. She said that she only wants Rolla to stop flying over and spraying over her property.

12. After the Rolla application, Elsie sent many samples of damaged farmstead vegetation (plant material) to Dr. Ronald Smith at NDSU, Fargo. Elsie took samples only from the immediate area of the farmstead (the area in white, outlined in blue pen), not from the tree belt just north of the farmstead. Exhibit 6. Dr. Smith responded to Elsie in a letter on September 8, 2000. Exhibit 21.

13. Dr. Smith found only Phenoxy (a growth regulator) damage to the plant material that Elsie sent to him. Exhibit 21. However, he did visual testing only and did not do any chemical analysis of the plant material.

14. The Department did have chemical analysis of plant material done on a sample obtained by one of its investigators, Consumer Protection Inspector Doug Johnston, after Elsie filed the complaint. The sample, probably leaves from two trees, both an ash and a sumac tree, was sent to the City of Fargo, Water Treatment Plant ("Fargo") for testing. Exhibits 10 and 12. A chemist from Fargo found glyphosate, the active ingredient of Roundup, in the sample. *See* exhibit 14. However, the amount found was very low. Exhibit 12. The amount of glyphosate found in the sample was 0.060 ug/g (microgram/gram) or 0.2 parts per million as a liquid. The

lowest detectable level of glyphosate is 0.025 ug/g and the highest level on the calibration curve is 5.0 ug/g.

15. Dr. Smith also testified as an expert for the Respondents. He testified that a finding 0.060 ug/g of glyphosate is "extremely low." He said that much Roundup would not have much effect on trees. He said that low amount would likely not be from a direct application, but would likely be from drift.

16. The Good flax field to which Krech was applying Roundup on August 23 was some distance from the farmstead, as far as approximately 1600 feet from the farmstead. *See* exhibits 6, 9, and 15. Krech testified that he flew close to the farmstead but not directly over it. He also testified that his flight pattern when he neared the farmstead was North and South, not East and West, though he flew East to West and West to East when he applied chemical to the Good field. Exhibit 16. However, he also testified that he only had his spray nozzles on to spray the Roundup on the flax field when he was directly over the flax field, at about six-ten feet off the ground, traveling West and East, and did not have them on when he was making his turns, traveling North and South. Considering the wind direction and wind speed that day, if Krech sprayed only over the flax field, regardless of whether he flew directly over or just near the O'Donnell farmstead on his turns, no Roundup could have drifted onto the farmstead. If he flew only near the farmstead, even if the nozzles were still on and spray was coming out, it would have drifted to the North and not on the farmstead. Only if his nozzles were still on and he was flying directly over the farmstead could pesticide spray, Roundup, have landed on the farmstead.

17. It is not known from the facts that are a part of the record of this administrative proceeding whether one can smell pesticide spray from a distance, *e.g.*, from a distance of 1600 feet, or closer, or further.

18. The only evidence about the condition of the plane and the application procedures in this matter is related by Krech. He testified at length about application procedures, generally, and specifically on August 23. There is no reason to disbelieve him other than he is an interested party in this proceeding. He a very experienced veteran of aerial pesticide applications. He has been a licensed pilot for thirty years and an aerial applicator for 28 years. He says that the Rolla plane he flew on August 23, 2000, is well maintained and was in good condition on August 23. He said that the spray nozzles were not leaking that day and he shut them off at the end of the flax field each time he turned to go North or South, turning so he could make another pass over the field going East or West. Exhibit 16. If he is to be believed, the nozzles were shut off well before he would have neared (or flew over) the farmstead. He said that he used a 1/4 mile buffer zone in making the Good pesticide application. Krech also testified that he saw no drift going over onto the farmstead. He said he specifically looked to see if there was any and there was not any drift. He said that he never applies pesticide when making turns. He said that when making his turns he flew close to the farmstead but not directly over it. Exhibit 16; *see* exhibit 19 and 20.

19. It should be noted that Krech also flew the same pattern over the same field under almost the same conditions, but without actually spraying, in 2001, and he claims that he did not fly over the farmstead; close by it, but not over it. *See* exhibits 19 and 20. Krech testified that on August 23, 2000, he tried to stay away from passing over the farmstead and he is certain that he did not pass over it. Krech said that he tries to stay away from passing over farmsteads in an attempt to keep people happy.

20. Mr. Johnston, who made the investigation for the Department, made his initial investigation on August 31, 2000. Exhibit 5. He testified that his initial impressions walking

around the farmstead were that there was no pesticide damage. Then, he walked around with Elsie, with her pointing out likely damage in several places. He took pictures of the sumac and ash tree. Exhibits 3 and 4, respectively; *see* exhibit 6 which shows the location of the two trees, indicated by an X for each. Johnston testified that when he saw the damage to the two trees he was not certain whether it was insect damage or chemical damage. He said that he took a sample from each of the two trees because he and Elsie thought that they had the most damage of any of the foliage. Only one sample that Johnston took, however, was sent to Fargo for testing. The evidence is not clear whether the sample tested included leaves from both of the trees sampled by Johnston or just from one of the trees.

21. On cross-examination, Johnston testified that most of the trees on the farmstead showed signs of disease and other stress. Johnston said that he could not distinguish any distinct pattern of drift on the foliage on the farmstead. He said that the damage on the farmstead trees appeared to him as if it could be Phenoxy damage. When asked at the hearing whether after his investigation he had concluded that there was chemical drift from the Rolla application on August 23, Johnston said that he does not make conclusions.

22. Johnston testified that Krech told him that Elsie had previously complained against him. Krech testified that Elsie had complained a number of times to Rolla about Rolla pilots crop spraying. He said that Elsie had also filed a complaint with the Department regarding Rolla on one other occasion. Krech testified that on August 23, 2000, when he learned that Elsie had called to complain, he did not stop flying and call her back because he knew she would ask him to stop spraying. He said that he did not stop flying until he had completed his spraying because he knew that he was spraying legally. Krech testified that it took him 29 passes to spray the Good flax field.



23. Johnston's investigation revealed that a Mike Haberstroh had sprayed a wheat field just South and West of the farmstead (*see* exhibit 18), in June of 2000. He had sprayed it with MCPA (a 2-4-D product, a Phenoxy type pesticide). Mr. Haberstroh had told Johnston that although Elsie had never complained to him about his spraying, he was unable to get any commercial applicators to apply pesticides on his fields near the farmstead.

24. Johnston testified that Roundup is a widely used pesticide in North Dakota. *See* exhibits 17 and 18. Krech also testified about Roundup being widely used in North Dakota and in the Rolla area. The evidence shows that Roundup was likely commonly applied in the area around the farmstead in 2000. At least the evidence shows that Roundup was widely purchased by farmers in that area in 2000. Exhibits 17 and 18. It may be inferred that at least some of those who purchased it in 2000 also applied it in 2000, in that area. Krech testified that he knows several farmers that have applied Roundup in the area near the farmstead, including a farmer just South and East of the farmstead. Upon cross examination, however, Krech could not say for certain if, when, and specifically where, Roundup was applied by nearby farmers in 2000, although he could say for certain that it was purchased by those farmers, again presumably for use that year, and in that area, possibly nearby the farmstead. Johnston did not inquire of any other of Elsie's neighbors to determine whether they had sprayed Roundup recently or anytime in 2000 near the farmstead. When asked why he did not make such an inquiry, Johnston replied that in his investigation it did not appear that Roundup had been applied. When asked whether he asked any neighbors if they had applied Phenoxy, Johnston said only Mr. Haberstroh.

25. Although there is some conflicting evidence, the evidence most reliably shows that Roundup has no odor. However, at the Good's request Rolla applied AMS with the Roundup on their flax field on August 23. AMS does have an odor. AMS is a fertilizer.

26. The expert testimony, viewed in light of the documentary evidence (especially the pictures) and the other testimony, indicates that the damage to Elsie's foliage on the farmstead on or about August 23, 2000, was likely disease, insect damage, and/or Phenoxy damage, not damage from Roundup. It was certainly not damage from direct application of Roundup (*i.e.*, Roundup being sprayed from an airplane directly above the farmstead). Notwithstanding the presence of glyphosate in the sample tested by Fargo, it is also not likely that the glyphosate was Roundup drift from the Rolla application on August 23. *See* paragraphs 16, 18, and 21 above. The evidence is inconclusive as to what actually caused the glyphosate to be present in the sample tested by Fargo.

27. The most telling evidence is that if Roundup was applied by Rolla over the farmstead, or its application drifted onto the farmstead, it would not have appeared as damage within 2 days of the application. In fact, it would not have appeared as damage for at least five to seven days, and in seven to ten days the plants or leaves on the plants would have died (it takes possibly somewhat less time for Roundup damage to appear when applied with AMS). Also, Roundup damage would not likely have appeared as damage in the form evident on the farmstead. Damage from Phenoxy, on the other hand, usually occurs within 24 hours of application. The type of damage to the farmstead foliage after the August 23 application of Roundup by Rolla was consistent with Phenoxy damage, not Roundup damage. Applications of Phenoxy can damage plants that are nearby the application, and, of course, Phenoxy drift can cause damage in nearby plants.

### **COMMENTARY ON FINDINGS OF FACT**

The decision in this matter comes down to proof, *i.e.*, the burden of proof. The Department has the burden to prove the allegations of the Complaint. It has not proven those allegations by the greater weight of the evidence.

Perhaps it is possible that plants on the farmstead were damaged by a direct application of Roundup, or an indirect application by Roundup drift, on August 23, damage caused by the negligent actions of Rolla, specifically Krech flying for Rolla, actions that were inconsistent with the label requirements. *See* exhibit 14, the Roundup label. But, it would have required an extraordinary event. Krech would have had to have his spray nozzles open well after he flew past the flax field he was spraying, open over the farmstead or open on the other side (the east side) of the farmstead. It is unlikely that he did. The ALJ does not believe that he did.

The evidence shows that the more likely scenario is something else. The evidence shows that what more than likely happened is that Krech flew the Rolla plane near the farmstead but not directly over it. While the plane was making its turns, flying North or South, it looked like it may have been flying directly over the farmstead, but it was really only flying very close. However, there was no pesticide (Roundup) drift falling on the farmstead from the Rolla plane because Krech had already shut off the spray nozzles. Any pesticide drift from the Rolla application that day would have drifted North, or North, Northwest, away from the farmstead, not over the farmstead. The plane's nozzles had likely been shut off before the plane started to make its turns. It makes no sense that Krech would leave the nozzles on during his turns. There is no evidence that the nozzles were defective or leaking on this occasion. If the O'Donnell's smelled something in the air on August 23, it was from a distance and not from pesticide falling directly down from the Rolla plane or drifting onto the farmstead.

What minimal damage on or about August 23 that there was to the farmstead plants was likely not from Roundup sprayed by Krech. It was likely from MCPA or some other phenoxy type herbicide applied by someone else at some other time.

Where the Roundup came from that was detected in the sample taken from trees on the farmstead is a mystery. However, it likely did not come from Roundup sprayed by Rolla on the farmstead on August 23. It may have come from someone else's previous ground application of Roundup at some other time in 2000, an application that could have drifted onto the farmstead, especially if the wind was high and/or from a direction that would cause drift. Elsie acknowledged that she is not always on the farmstead. She does go elsewhere from time to time. Someone may have been spraying Roundup nearby when she was gone, without her knowledge.

Although there is clearly glyphosate, the active ingredient of Roundup, present in samples taken from the farmstead after the August 23 Rolla application of Roundup, there is not enough evidence to prove that it is Roundup from the Rolla application. In fact, the evidence taken as a whole points elsewhere, away from Rolla; just where, specifically, is not known.

As a practical matter, Rolla's pilots seem to have the good sense to avoid flying over the farmstead and would do well in the future to stay clear of the farmstead, avoiding it by as much space as possible. However, legal applications by Rolla on the property of others cannot be proscribed.

### **CONCLUSIONS OF LAW**

1. Krech is currently a certified commercial applicator of pesticides in North Dakota. He was also certified in August 2000. Krech is an officer and employee of Rolla. Krech's acts, omissions, or failures may be deemed the acts, omissions or failures of Rolla.

2. On August 23, Krech flew a Rolla airplane applying Roundup and AMS to a flax field near the farmstead. However, the evidence does not show, by the greater weight of the evidence, that the application by Krech was accomplished in a faulty, careless, or negligent manner, in violation of N.D.C.C. § 4-35-15(5), or that the application was made inconsistent with the pesticide label, in violation of N.D.C.C. § 4-35-15(2). Rather, the evidence is at best inconclusive or even shows a different scenario, one in which Krech applied pesticide in a careful manner, avoiding direct application on the farmstead and indirect application by drift over the farmstead. The Department has not proven a violation of the law by Krech and, thus, by Rolla, either.

### **RECOMMENDED ORDER**

The greater weight of the evidence does not show that Rolla and Krech violated the provisions of N.D.C.C. § 4-35-15(2) and (5). The ALJ recommends that the Complaint against Rolla and Krech, the Respondents, be, in all things, DISMISSED.

Dated at Bismarck, North Dakota, this 27 day of November, 2001.

State of North Dakota  
Roger Johnson  
Commissioner of Agriculture

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